IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1147 OF 1998

IN

ARBITRATION PETITION NO.177 of 1994

M/s.Mukund Limited, a Company incorporated under the Indian Companies Act, 1913 (VII of 1913) having its registered office at Lal Bahadur Shastri Marg, Kurla, Bombay - 400 070. ..Appellant.

V/s.

Hindustan Petroleum Corporation Limited, a Govt. of India enterprises and a Govt. Co. within the meaning of Companies Act, 1956 and having its registered office at 17, Jamshedji Tata Road, Bombay - 400 020. ..Respondent.

Dr.V.D.Tulzapurkar, Senior Advocate with Alpana Ghone i/b. Shah Desai Doijode & Phatarphekar for appellant.

Mr.V.C.Kotwal Senior Advocate along with M.D.Sisodia i/b.Rustamji & Dinesh Mulla & Ginwala for respondent.

CORAM : R.M.LODHA AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON 3RD DECEMBER, 2004.

JUDGMENT PRONOUNCED ON 17TH DECEMBER, 2004.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.)

1. By an award dated 27th June, 1994 made under the provisions of the Arbitration Act, 1940, the learned arbitrator held that on account of breach of contract the appellant is liable to pay to the respondent a sum of Rs.1,26,67,529.10 together with costs quantified at Rs,75,600/-. The appellant challenged the said award by filing an arbitration petition No.177 of 1994. The learned Single Judge while upholding the award reduced the quantum from Rs.1,26,67,529.10 to Rs.71,31,954.40 and passed a decree in favour of the respondent and against the appellant in terms of the modified award. Challenging the said decree, the appellant has filed the present appeal.

2. The facts relevant for this appeal are that pursuant to a tender enquiry floated by the respondent on 7/11/1989 for design, fabrication and commissioning of Propane-de Asphalting heater (PDA heater) at Mahul, Mumbai, the appellant in association with Engineering India Ltd. (EIL), New Delhi submitted its price bid offer on 6/2/1990. Thereafter, several meetings were held between the appellant and the respondent pursuant

to which, the appellant agreed to revise the bid price and also extend the validity of the offer. At the request of the respondent, the appellant by a letter dated 21/9/1990 gave break-up of supply, erection and CIF value of the imported items. On 11/1/1991 further discussions were held between the parties and the terms arrived there at were recorded in the form of a memorandum of discussion (MOD). On the same day i.e. on 11/1/1991 itself the respondent sent a Telex of Intent (TOI) to the respondent stating therein that in the light of the discussion held and the MOD arrived at between the parties, the offer of the appellant has been accepted. It was further stated that the said TOI should be treated as a firm commitment and that the purchase order for the turnkey job would soon be issued by the respondent. The said T.O.I. dated 11/1/1991 reads as under :-

" Hindustan Petroleum Corporation
Refinery Division.

Telex of Intent January 11, 1991.
TLX1011-71499
Mikio-IN

Mukund Ltd.,
Bombay.
KIND ATTN: MR.UTTAMANI.

DEAR SIR,
RE. YR.QTN.EOD : P-255-098 OF 6 FEB.1990 AND ALL OTHER CORRESPONDENCE & DISCUSSIONS UPTO AND UNTIL MOD OF 11.1.91 AGST OUR ENQ.FM-BS-131/

PDA FOR PDA HEATER (.)
PLSD TO INFORM THAT YR OFFER IS ACCEPTED AND A.D.O FOR TURNKEY JOB FOR DESIGN,FABRICATION AND ERECTION OF A HEATER FOR A TOTALBASIC COST OF RS.2.17 CRORES WILL BE ISSUED TO YOU SHORTLY (.)

DELIVERY : WITHIN 16 MONTHS OF TOI (.)

ALL PAYMENTS WILL BE MADE BY CHEQUE & ALL ADVANCES AGST B/G(.) SIMILARLY L/C FOR 65% SHOULD BE COVERED BY A B/G FOR EQUIVALENT AMT(.) THIRD PARTY INSPECTION CHARGES EXTRA FOR INDIGENOUS ITEMS(.)
PRICE ESCALATION FOR CHANGE IN EXCHANGE RATE & CUSTOMS DUTY ON VALUE OF IMPORTED COMPONENTS WILL BE APPLICABLE (.).

OTHER TERMS SUCH AS L.D. ARBITRATION CLAUSE AS PER OUR TENDER WILL BE APPLICABLE (.)

PLEASE TREAT THIS AS A FIRM COMMITMENT (.) DETAILED ORDER FOLLOWS (.)

I S P SARMA
CH.MATERIALS MANAGER
PROJECTS"

3. It is an admitted fact that neither the tender terms nor the offer made by the appellant contained any clause for arbitration but the TOI dated 11/1/1991 contained an arbitration clause.

4. No objection was raised by the appellant to the TOI dated 11/1/1991 and in fact, the appellant vide letter dated 23/1/1991 forwarded a bank guarantee for Rs.21.70 lakhs to the respondent with a view to obtain mobilisation advance for carrying out the project work. As per the TOI, the respondent issued

two purchase orders, one on 8th February, 1991 for supply of materials and another on 8th March, 1991 for erection and commissioning of work. It is the case of the appellant that both the above delivery orders were actually delivered to the appellant belatedly in March, 1991. In any event, after the issuance of the delivery orders, mobilisation advance of Rs.19,99,493/- was paid by the respondent to the appellant for commencing the above project work.

5. Thereafter, by a letter dated 26th March, 1991 the appellant for the first time contended that point No.6 contained in the purchase order dated 8/2/1991 was not in terms of the offer made by the appellant. According to the appellant, vide letter dated 10/9/1990 the appellant has clarified that the price offered by them included excise duty and sales tax payable on bought out items and raw materials, but the price quoted does not include sales tax, works contract tax, excise duty and any other statutory levies applicable to works contract and if the above taxes are applicable and paid by the appellant, then the respondent shall reimburse the same on production of proof of payment. It is pertinent to note that in the said letter dated 26/3/1991 the appellant had not objected to the arbitration clause contained in the

TOI dated 11/1/1991 and also in the purchase orders. The only objection raised by the appellant in the letter dated 26/3/1991 was that one single contract on works contract basis should have been issued. Similar letter was written by the appellant to the respondent on 19th June, 1991. It is not in dispute that on receiving the mobilisation advance, the appellant commenced the project work by floating enquiries to different vendors for supply of imported and long delivery items and submitted progress report to the respondent from time to time. In the minutes of the meeting (MOM) recorded on 30/9/1991 between the representatives of the appellant, the respondent and the EIL it was stated that the EIL has completed the design for the furnace and that the revised API data for the furnace with the comments of the respondent have been handed over to the appellant. It was also recorded that the scope of cabling work clarified by the respondent has been accepted by the appellant.

6. However, by a letter dated 9/11/1991 the appellant informed the respondent that they had accepted the project in association with EIL according to which the EIL was to provide the complete technical services for design and engineering and the appellant was to arrange for the hardware. It was stated that

EIL was reluctant to take the total technical responsibility due to their organisational change and that after a lot of persuasion EIL agreed to undertake the job on 5/3/1991. The data sheet prepared by EIL after detailed engineering submitted to the respondent by end of May, 1991 were cleared by the respondent only by the end of September, 1991. In the meantime, the cost of the items required for the project has increased astronomically. It was further stated that the unexpected devaluation of rupee, revised import policy and increase in taxation has also resulted in increasing the cost of the materials. For all the aforesaid reasons, it was stated that it has become impossible for the appellant to absorb the additional cost and accordingly, called upon the respondent to confirm as to whether they would reimburse the additional costs to be incurred by the appellant on the project. In the said letter, the appellant reminded the respondent that in spite of repeated letters the respondent has not issued the revised purchase order.

7. By a reply letter dated 21/11/1991, the respondent informed the appellant that all along the appellant has been giving a rosy picture that they are proceeding with the job and that they have obtained

necessary quotations to place the order for bought out items. It was stated that at a meeting held recently, the appellant had confirmed that they have all the quotations available with them to place the orders. It was further stated that at the commencement of the project work around March, 1991, the appellant had expressed difficulty in handling the EIL. The respondent came to the rescue of the appellant and sorted out the differences between the appellant and the EIL. It was further stated that when the appellant submitted the revised PERT chart dated 21/8/1991 indicating a delay of 2 months, the respondent had strongly advised the appellant to take appropriate steps to compress the schedule to the contractual delivery period and the appellant had agreed to adhere to the contractual delivery period. It was further stated that the appellant has not taken the job seriously right from the beginning and that if the appellant had taken appropriate action for procurement of the items promptly and immediately after the purchase orders were issued, the changes in the governmental, industrial policy would not have made any difference to the appellant. It was further clarified that the claim put forth by the appellant are tenable only to the extent of foreign exchange component and excise duty which will be dealt with as

per the provisions of the purchase orders. It was clarified that all other claims of additional costs due to the material procurement and design changes will have to be borne by the appellant. By the said letter, the appellant was called upon to proceed with the work without any further delay in compliance of the terms and conditions of the purchase orders.

8. Thereafter, several letters were exchanged between the parties. Ultimately, by its letter dated 30th April, 1992 the appellant informed the respondent that unless an increase in the costs amounting to Rs.110 lakhs inclusive of Rs.22.10 lakhs reimburseable by the appellant on account of foreign exchange components and customs duty and Rs.27.60 lakhs due to variation in the design submitted by EIL is granted, it will not be possible for the appellant to continue with the project. The respondent vide letter dated 16/11/1992 rejected the claim of the appellant and terminated the contract on the ground that the appellant has no firm or definite intention to carry on with the contract as per the agreed terms. By the said letter, the respondent invoked the arbitration clause to decide all disputes and differences arising as a result of termination of the contract.

9. In the meantime, the respondent on 9th January, 1992 had issued tender enquiry for the said work which was entrusted to the appellant. Pursuant to the said tender enquiry M/s.Kinetics Technology India Ltd., had submitted an offer and the same was accepted by the respondent by a letter of intent dated 28th October, 1992.

10. After invoking the arbitration clause, the respondent by its letter dated 27/11/1992 forwarded three names of the arbitrators and called upon the appellant to select one of the arbitrators mentioned therein within 30 days of the receipt of the said letter. The appellant by its letter dated 29/11/1992 contended that there was no concluded contract and consequently, there being no arbitration clause, the question of referring the dispute to the arbitral tribunal does not arise. However, it was stated that without prejudice to the above, the appellant is agreeable to appoint Mr. M.N. Bhatkal, Advocate, High Court, Bombay (one of the arbitrator suggested by the respondent vide their letter dated 27/11/1992) as an arbitrator not under the alleged contract but outside the alleged contract to decide as to whether there was a concluded contract between the parties. By a letter dated 6/1/1993 the respondent referred the

entire dispute to the arbitration of Mr. M.N.Bhatkal, Advocate. The appellant addressed a letter to Mr.Bhatkal stating that they would agree to his arbitration not under the contract but outside the contract to decide as to whether their existed a concluded contract between the parties.

11. On completion of arbitration proceedings and after hearing the parties, the learned arbitrator by an award dated 27/6/1994 held that the contract is concluded by the TOI dated 11/1/1991, but the arbitration clause in the TOI was a counter offer and there is no acceptance of the said counter offer by word of mouth or in writing by the appellant. However, the learned arbitrator held that the purchase orders contained an arbitration clause and the same was accepted by the appellant by their conduct. The learned arbitrator further held that the clause "LD arbitration clause as per tender will be applicable" in the TOI dated 11/1/1991 is to be read as "LD as per our tender and the arbitration clause will be applicable". Accordingly, the arbitrator held that the appellant who has committed breach of contract is liable to pay a sum of Rs.1,26,67,529.10 with costs of Rs.75,600/- to the respondent on or before 28th July 1994, failing which the appellant would be liable to

pay additional interest at the rate of 11% from 28/6/1994 on Rs.1,26,67,529.10 till payment of the said amount by the appellant to the respondent.

12. The appellant filed an arbitration petition to challenge the above award. The learned Single Judge while disposing of the above arbitration petition held that the arbitrator was right in holding that there was a concluded contract. The learned Single Judge, however, reduced the quantum awarded by the learned arbitrator and passed a decree in terms of the modified award for Rs.71,31,954.40 but maintained the costs quantified by the learned arbitrator at Rs.75,600/-. Hence this appeal.

13. Dr.Tulzapurkar, learned senior advocate appearing on behalf of the appellant broadly submitted as follows:-

a) There is no concluded contract between the parties and, therefore, there is no arbitration agreement.

b) TOI dated 11/1/1991 cannot constitute a binding contract because, firstly the arbitration clause in the TOI was a counter

offer which is not accepted by the appellant and secondly, the arbitration clause contained in the TOI is vague and, therefore, it cannot be said that the parties were ad-idem in the matter of arbitration.

c) Similarly, the purchase orders dated 8/2/1991 and 8/3/1991 issued by the respondent cannot be said to constitute a binding contract as the terms contained therein have not been accepted by the appellant.

d) In any event, in the absence of a clear finding as to the date on which the breach of contract is allegedly committed by the appellant and in the absence of any evidence led by the respondent regarding the market price of the items prevailing on the date of the breach the appellant could not be saddled with the liability to pay damages.

14) Elaborating the aforesaid submissions, Dr. Tulzapurkar submitted that under section 7 of the

Indian Contract Act, 1872, the proposal or offer made by one party gets converted into a promise only when there is an absolute and unqualified acceptance of the said offer by the other party. To constitute a binding contract, the acceptance of the offer must be absolute and unconditional. In the present case, the TOI dated 11/1/1991 contained an additional term of arbitration which was not there in the offer made by the appellant. Therefore, it cannot be said that by the TOI dated 11/1/1991 the respondent had unconditionally accepted the offer made by the appellant. The counsel further submitted that, at best the TOI dated 11/1/1991 can be said to be a counter offer made by the respondent, which was not accepted by the appellant. In fact, the learned arbitrator has given a finding that there is no acceptance of the arbitration clause contained in the TOI dated 11/1/1991 by the appellant either by word or mouth or in writing. Therefore, the learned arbitrator was clearly in error in holding that the TOI dated 11/1/1991 issued by the respondent constituted a concluded contract. In this connection, Dr.Tulzapurkar relied on the decision of the Apex Court in the case of **Badri Prasad V/s. State of M.P. [A.I.R. 1970 S.C. 706]**, decision of Delhi High Court in the case of **Union of India in the case of M/s.Uttam**

Singh Dugal & Co. (Pvt.) Ltd. [A.I.R. 1972 Delhi 110] and **Union of India V/s. Mohan Meakin Breweries Ltd. [A.I.R. 1988 NOC 33 (Delhi)]**.

15. In the alternative, Dr.Tulzapurkar submitted that even if the counter offer made by the respondent is held to be accepted, the arbitration clause in the TOI dated 11/1/1991 being totally vague cannot be held to be binding. He submitted that the TOI dated 11/1/1991 provides that the arbitration clause as per the tender would be applicable, but in fact and it is admitted by the respondent that the tender conditions do not contain an arbitration clause. He submitted that if the offer is vague and no precise meaning could be attributed to it, then, it cannot be said that the parties were at ad-idem and consequentially there is no enforceable contract between the parties. In this connection, the counsel relied upon the decisions reported in 1941 Appeal Cases 251, 85 Calcutta Law Journal, 136, 56 Calcutta Weekly cases 763 and A.I.R. 1955 Calcutta, 588.

16. The learned counsel for the appellant further submitted that even the purchase orders containing the arbitration clause do not constitute a binding contract as there is no evidence on record to

show that the appellant has accepted the arbitration clause contained in the purchase orders. The counsel for the appellant further submitted that the purchase orders were materially different from the offer made by the appellant, atleast on four points as stated below :-

(i) The price offered by the appellant is different from the price mentioned in the purchase order. Moreover, in the purchase order, it was stated that if the contract stood frustrated after the fabrication was done by the appellant at site but before erection and commissioning, then the respondent would pay nothing to the appellant. Such a term was neither contained nor envisaged in the offer made by the appellant.

(ii) The appellant had offered that if the taxes and levies were applicable to the works contract and if such taxes and levies are paid by the appellant, then the respondent would reimburse the same. However, the purchase order in clause 6 states that the prices are inclusive of

all taxes, duties as applicable to the materials supplied and no extra charges will be payable by the respondent.

(iii) Neither in the original offer, nor in the clarifications issued by the appellant prior to 11/1/1991 nor in the minutes of the meeting held on 11/1/1991 there is any reference to the arbitration clause. However, the purchase orders contain an arbitration clause, which is not accepted by the appellant.

(iv) As per clause 14 of the purchase order, the respondent had a right to terminate the contract which was neither contained in the offer nor in the clarifications issued and not even in the minutes of the meeting recorded on 11/1/1991.

Accordingly, it was submitted that in view of the material differences in the terms offered and the terms contained in the purchase orders, it could not be said that there was any valid acceptance in law and at best the purchase orders could constitute counter offer. However, the said counter offer was not

accepted by the appellant as can be seen from the letters addressed by the appellant to the respondent on 26th March, 1991, 19th June, 1991, 9th November, 1991, 7th January, 1992, 7th February, 1992 and 10th February, 1992. Accordingly, it was submitted that the purchase orders do not constitute concluded contract. Consequently, there being no clause for arbitration, the disputes raised by the respondent could not be referred to the arbitration.

17. The learned counsel further submitted that the appellant had led oral evidence to the effect that the officers of the appellant had orally objected to the arbitration clauses in the purchase orders and the same has not been challenged in the cross-examination and, therefore, in view of the aforesaid uncontroverted evidence on record, the finding of the learned arbitrator that the purchase orders were accepted by the appellant by conduct is totally perverse.

18. It was further submitted that furnishing a bank guarantee and receiving mobilisation advance by the appellant does not amount to acceptance of the purchase orders as the bank guarantee for mobilisation advance was given by the appellant to the respondent

on 21/1/1991 i.e. before the issuance of the purchase orders dated 8/2/1991 and 8/3/1991. It was submitted that the acceptance of mobilisation advance was in anticipation of a concluded contract being arrived at. Accordingly, it was submitted that in the absence of a binding contract arrived at between the parties containing a clause for arbitration, the disputes between the parties could not be referred to arbitration.

19. The learned counsel for the appellant further submitted that the finding given by the learned arbitrator that the TOI dated 11/1/1991 constituted a binding contract is contrary to the case of the respondent. He submitted that the contention of the respondent before the learned arbitrator was that the purchase orders constituted a binding contract. Therefore, the findings of the arbitrator which are contrary to the evidence on record are liable to be quashed and set aside. The counsel for the appellant further submitted that the findings given by the learned arbitrator were contradictory and mutually destructive inasmuch as, at one place, the learned arbitrator has stated that the contract is evidenced by the the TOI dated 11/1/1991 and at another place, the learned arbitrator has given a

finding that the purchase orders containing an arbitration clause were accepted by the conduct of the appellant and the purchase orders constituted a binding contract. The learned counsel further submitted that when a clause in the TOI dated 11/1/1991 specifically provides that "other terms such as LD arbitration clause as per the tender will be applicable", it was not open to the learned arbitrator to read that clause as "other items such as LD as per tender and arbitration clause will be applicable." Such a course, it was submitted amounts to re-writing the contract which is not permissible in law. The counsel submitted that assuming the arbitration clause in the TOI dated 11/1/1991 was independent of tender, the same being vague and not accepted by the appellant cannot bind the appellant.

20. Referring to the Judgment of the learned Single Judge, the learned counsel for the appellant submitted that the learned Single Judge has not given a finding as to which document constitutes a concluded contract. He submitted that if the learned Single Judge was considering the TOI dated 11/1/1991 as a concluded contract, then, as stated hereinabove, in view of the additional terms contained in the TOI it could not be said that the offer of the appellant was

unconditionally accepted by the respondent, and consequently, it could not be said that the TOI dated 11/1/1991 constituted a binding contract. If the learned Single Judge was considering the purchase orders to be concluded contract, then, the same is untenable because the purchase orders were never accepted by the appellant. It was submitted that although the appellant had declined to chose an arbitrator for deciding the dispute under the contract, the respondent had proceeded on the footing that the name of Mr.Bhatkal was selected by the appellant and on that footing purported to refer the dispute to the arbitrator. It was submitted that the aforesaid conduct was contrary to the procedure laid down in the arbitration agreement, assuming that there was any valid and binding arbitration agreement.

21. Referring to the quantum of damages awarded, the learned counsel for the appellant submitted that having held that there was no delay on the part of the appellant alone and non performance was attributable to both the appellant and the respondent, the learned arbitrator could not have held that the appellant is liable to pay damages. The counsel for the appellant submitted that in the absence of any clear cut finding as to the date on

which the alleged breach was committed by the appellant, no damages could be awarded in favour of the respondent and against the appellant. The learned arbitrator proceeded on the assumption and presumption that the alleged breach could be in November, 1991. Admittedly, the contract was terminated by the respondent on 16/11/1992. Therefore, till 16/11/1992, the alleged contract was kept alive by the respondent and hence the date of termination of the contract could be the date of the alleged breach of contract. In these circumstances, the hypothetical findings given by the arbitrator that if the breach is committed in November, 1991 it is reasonable to accept that the period of 6 months would be required for the parties for taking fresh purchase orders after terminating the contract and, therefore, to treat the month of April, 1992 as the relevant month for computing the compensation is wholly untenable.

22. The learned counsel for the appellant further submitted that if the breach is committed in November, 1991 as held by the learned arbitrator, then, the difference in price between the contract price and market price prevailing in November, 1991 should have been the basis for determining the damages. However, the learned arbitrator has

erroneously taken April 1992 as the relevant date for determining the damages. He submitted that when the alleged contract was terminated on 16-11-92, the learned arbitrator could not have determined the damages based on the price allegedly prevailing in April 1992. Accordingly, the learned counsel submitted that in the absence of any findings given by the learned Single Judge as to the date of the breach allegedly committed by the appellant and in the absence of any evidence of the market price as on the date of the breach, the learned Single Judge was in error in upholding the damages awarded by the learned arbitrator. He submitted that in law, the damages must be assessed by finding out the difference between the contract rate and the market rate of the contracted goods as on the date of the breach and in the absence of any such finding no damages could be awarded. In this connection, the learned counsel relied upon the decisions reported in A.I.R. 1964 Bombay 76 at page 81 (paragraph 21) and A.I.R. 1968 S.C. 741 (paragraph 7). For all the aforesaid reasons, the learned counsel submitted that the decree passed by the learned Single Judge in terms of the modified order be quashed and set aside.

23. Mr.Kotwal, learned senior advocate

appearing on behalf of the respondent, on the other hand, supported the order passed by the learned Single Judge. The learned counsel for the respondent fairly stated that neither the tender conditions nor the offer made by the appellant contained an arbitration clause. However, the learned counsel submitted that the TOI dated 11/1/91 issued after detailed discussion clearly sets out the arbitration clause and the same was followed by two purchase orders wherein the modalities of the arbitration have been specifically set out. The learned counsel submitted that the appellant has in fact treated the TOI which was followed by purchase orders as firm commitment and had actually commenced the project work in association with EIL. It was only when the EIL backed out, the appellant being unable to fulfill the entire contractual obligation has as an afterthought raised a plea that there was no concluded contract so as to avoid liability.

24. The learned senior advocate for the respondent further submitted that from 11/1/1991 till the contract was terminated and the arbitration clause was invoked by the respondent on 16/11/1992, the appellant had not raised any objection to the arbitration clause contained in the TOI dated

11-1-1991 and the purchase orders dated 8/2/1991 and 8/3/1991. According to the learned counsel for the respondent, non existence of the arbitration clause in the tender did not invalidate the arbitration clause contained in the TOI dated 11-1-1991, because, what was understood by the parties was that in case of any dispute in execution of the contract, the same shall be referred to the arbitration as per the detailed order to follow. Accordingly, in the purchase orders issued after the issuance of TOI dated 11-1-1991 the modalities of the arbitration clause were specifically set out. The appellant had treated the TOI followed by purchase orders to be firm commitment and undertook the project work without any reservation. If there was no concluded contract, the appellant would not have commenced work to execute the contract. It could not be said that the project work was undertaken in anticipation of a concluded contract, because, there was no dispute as to the arbitration clause contained in the TOI and the purchase orders and hence there was no question of arriving at a contract without any arbitration clause. Therefore, it was submitted, that the plea raised for the first time after the contract was terminated that there was no concluded contract is wholly untenable.

25. The learned counsel for the respondent further submitted that it was open to the parties to treat the TOI dated 11/1/1991 with an arbitration clause as a firm commitment subject to the modalities of arbitration to be specified in the purchase orders. It is not in dispute that the purchase orders do contain detailed arbitration clause. It is also not in dispute that the appellant has in fact commenced the work as per the TOI dated 11/1/1991 followed by purchase orders without raising any dispute regarding the arbitration clause. In these circumstances, it was submitted that the TOI dated 11-1-1991 which was followed by purchase orders constituted a binding contract. In support of this contention, the learned counsel for the respondent relied upon an English case in the case of **Pagnan V/s. Feed Products** reported in **(1987) Volume 2 Lloyd's Law Reports, 601**.

26. The learned counsel for the respondent further submitted that with a view to perform the contractual obligation contained in the TOI dated 11-1-91 followed by purchase orders, the appellant had executed the requisite bank guarantee and obtained mobilisation advance from the respondent. Thereafter the appellant had submitted the designs, placed orders for delivery items and submitted data sheet from time

to time. When there were differences between the appellant and the EIL, the intervention of the respondent was sought for and the respondent had in fact sorted out their differences and had directed them to ensure that the delivery schedule of the job is not affected on account of the differences between the appellant and the EIL. Subsequently, when the EIL declined to fulfil its obligation as per the mutual understanding arrived at between the appellant and the EIL (for which the respondent was not a party), the appellant expressed its inability to complete the job work unless the respondent agreed to bear the additional cost. In these circumstances, the learned counsel submitted that the contention of the appellant that there is no concluded contract or that the arbitration clause is vague and not binding on the appellant is clearly without any merit.

27. As regards the quantum of damages awarded by the learned arbitrator and modified by the learned Single Judge, the learned counsel for the respondent submitted that although the contract was terminated on 16/11/1992, it was open to the respondent to take into account the market price prevailing in April, 1992. In present case the appellant by a letter dated 30/4/1992 had quantified the additional cost at Rs.110

lakhs based on the market price prevailing in April, 1992. In these circumstances, the learned counsel for the respondent submitted that although no independent evidence was adduced by the respondent with regard to the market price prevailing on the date of breach, in the light of the letter of the appellant dated 30/4/1992 wherein additional cost of the items were quantified with reference to market price of the items prevailing in April 1992, it was permissible to take that price as the basis for computing the compensation. In this connection, the learned counsel for the respondent relied upon the decision of the Apex Court in the case of **M.N. Gangappa V/s. A.N.Setti & Co.** reported in **A.I.R. 1972 S.C. 696**. The counsel further submitted that although in November, 1991 the appellant has sought for reimbursement of additional cost, meetings were held thereafter in a bid to persuade the appellant to complete the project as per the contract. However, in April, 1992 the appellant expressed its inability to complete the work unless the additional cost is borne by the respondent. Therefore, the price prevailing in April, 1992 has been rightly taken as the basis for determining the damages. Accordingly, the learned counsel submitted that there is no merit in the appeal and the same be dismissed with costs.

28. We have carefully considered the rival submissions. Basically, two issues are required to be considered in this appeal. Firstly, whether there was a concluded contract between the parties with an arbitration clause for resolving the disputes between the parties. Secondly, assuming that there was a concluded contract, whether damages could be awarded without determining the date on which the breach was committed and without determining the market price of items on the date of breach.

29. As regards the first issue is concerned, there can be no dispute that to constitute a binding contract the acceptance of the offer must be absolute and unqualified. Where the parties mutually agree that an express agreement is a precondition for a concluded contract, then, from the terms of the express agreement, it can be easily found out as to whether there is a concluded contract or not. However, where there is no such precondition of executing an express agreement and the parties decide to enter into a contract by correspondence, it becomes necessary to look into the entire correspondence as a whole to determine as to whether there is a concluded contract or not. Thus, the correspondence between the

parties have to be analysed carefully to ascertain as to whether an offer has been absolutely and unconditionally accepted so as to constitute a binding contract between the parties.

30. In the present case, on a tender floated by the respondent, the appellant had offered to do the project work of design, supply, fabrication, erection and commissioning of PDA heater on the terms set out in their letter dated 6/2/1990. Admittedly, after several meetings the said offer was revised and in the MOD recorded on 11/1/1991 the modalities of making payment for executing of the contract were finalised. On 11/1/1991 itself the respondent issued a TOI stating therein that in the light of discussions held between the parties as recorded in the correspondence and the MOD, the respondent had accepted the revised offer of the appellant on broad terms set out therein including a clause for arbitration and that the detailed order would follow. The said TOI dated 11/1/1991 was to be treated as a firm commitment between the parties. Thereafter, two purchase orders were issued by the respondent which contained a detailed arbitration clause. The fact that the appellant had accepted the TOI dated 11/1/1991 as a firm commitment is evidenced by the fact that as per

the terms of TOI dated 11/1/1991 the appellant by a letter dated 23/1/1991 forwarded a bank guarantee with a bill seeking mobilisation advance of Rs.21,70,000/-. By the said letter, the appellant sought release of payment at the earliest so as to take up the project work. After the purchase orders were issued on 8/2/1991 and 8/3/1991 the appellant in fact obtained mobilisation advance from the respondent and commenced the project work by floating enquiries to different vendors for supply of imported and long delivery items. In the meantime, the appellant got the design for the furnace prepared from EIL. The appellant prepared the revised API data for the furnace and submitted the same to the respondent. From the correspondence, it is seen that while executing the project work disputes arose between the appellant and the EIL and the respondent intervened and sorted out their dispute. Thereupon, the appellant had assured the respondent that the project would be completed within the scheduled delivery period. Accordingly, the project work contained and the appellant had submitted progress report to the respondent from time to time. It is further seen from the correspondence that when the EIL expressed its inability to bear the technical responsibility, the appellant found it impossible to complete the project. Thus, from the

entire correspondence exchanged between the parties, it is seen that right from the issuance of TOI dated 11/1/1991 till the date of termination of contract on 16/11/1992 there was no dispute as to the existence of a concluded contract and the appellant since inception accepted the TOI dated 11/1/1991 followed by purchase orders dated 8/2/1991 and 8/3/1991 as firm commitment and undertook the project work on the footing that the terms set out therein were binding upon the appellant.

31. If the appellant had considered the TOI dated 11/1/1991 containing an arbitration clause constituted a conditional acceptance (or in other words counter offer), then, the appellant was not obliged to perform the contract as there would be no concluded contract. If the appellant had carried on with the project work in anticipation that a concluded contract without any arbitration clause would be executed, then, surely, the appellant would have objected to the arbitration clause and called upon the respondent to accept the offer without any arbitration clause. The agreement of parties as to the terms of a contract can be proved not only by their words but also by their conduct in accordance with the maxim - non refert an quis assensum suum praefert verbis, aut rebus ipsis et factis - it matters not whether a man

gives his assent by his words, or by his acts and deeds. In the TOI, it was provided "other terms such as L.D. arbitration clause as per our tender will be applicable...detailed order follows". This term was a clear indication of resolving the disputes between the parties by way of arbitration and use of the words ‘as per tender’ in the said term was only a mistake. In the subsequent order (i.e. purchase orders) the arbitration clause was set out in detail. The appellant had not objected to the arbitration clause at any point of time. In fact, the conduct of the appellant in furnishing bank guarantee and obtaining mobilisation advance as per the TOI dated 11/1/1991 and commencing the project work unconditionally, clearly shows that the appellant had accepted the TOI dated 11/1/1991 with the arbitration clause as the absolute and unqualified acceptance so as to constitute a binding contract between the parties.

32. Strong reliance was placed by the counsel for the appellant on the decision of the Apex Court in the case of Badri Prasad (supra). In that case, as per the written contract the plaintiff was entitled to cut teak trees having more than 12 inches girth standing in 1000 acres of the forest in Mouza Sunderpani Jagir land for Rs.17,000/-. After the

above contract was entered into and before the contract could be performed, the Abolition of Proprietory Rights (Estate, Mahals, Alienated Lands) Act, 1950 came into force. As a result, the contracted land stood vested in the State Government and the State Government prohibited the plaintiff from cutting the trees under the contract. On negotiations, the State Government called upon the plaintiff to inform as to whether he was willing to pay further sum of Rs.17,000/- (in addition to Rs.17,000/- already paid) for the contract of the bid trees. The plaintiff agreed to pay Rs.17,000/- provided his claim to have a refund of the amount of Rs.17,000/- paid under the earlier contract remains unaffected. In that context, it was held that the acceptance of the offer was conditional and qualified. In the present case, the facts are totally different. In the present case, the appellant undertook the project work as per the TOI dated 11/1/1991 unconditionally and had never raised any objection to the arbitration clause contained in the TOI dated 11/1/1991. Therefore, the above decision of the Apex Court is wholly distinguishable on facts.

33. Once it is held that the TOI dated 11/1/1991 constituted a binding contract, then the

next issue to be considered is whether the arbitration clause contained therein is vague and, therefore, not binding. It is not in dispute that in the purchase orders issued after TOI, the mode and the manner of arbitration has been set out. The question is, whether it is open to the parties to be bound by arbitration leaving the mode and manner of arbitration to be decided lateron. In our opinion, it is open to the parties to agree for arbitration in principle leaving the modalities of arbitration to be specified lateron. In other words, it is open to the parties to be bound by the arbitration clause leaving the mode and the manner of referring the disputes to the arbitration to be decided thereafter. In such a case, it cannot be said that the arbitration clause was vague on the date on which the parties agreed to be bound by it. In such a case, the arbitration clause has to be read in the light of the mode and the manner of arbitration set out subsequently. In the present case, as stated hereinabove, the purchase orders issued on 8/2/1991 and 8/3/1991 contain the mode and the manner of referring the dispute to arbitration and the appellant has not found any fault with the arbitration clause contained therein. It is true that the TOI refers to the arbitration clause contained in the tender and admittedly, the tender does not contain

any arbitration clause. In our opinion, the above discrepancy is inconsequential when it is seen that by TOI dated 11/1/1991 the parties had in principle agreed to the arbitration subject to the details to be specified in the purchase orders to follow and in fact the purchase orders do contain the mode and the manner of referring the disputes to arbitration. As stated hereinabove, the appellant has not found any fault in the arbitration clause contained in the purchase orders. Therefore, the contention of the appellant that the arbitration clause contained in the TOI is vague or that the parties were not ad idem in the matter of arbitration is devoid of any merit and must be rejected.

34. As stated hereinabove, the terms contained in the TOI dated 11/1/1991 were never disputed or objected to and the only grievance made in the letter of the appellant dated 26/3/1991 and the subsequent letters was that in the letter of offer as well as the clarificatory letters, the appellant had agreed to execute the work at site as works contract and if the contract is finalised for supply and fabrication as a separate contract, then, it will attract excise duty and Maharashtra sales tax and, therefore, the respondent was requested to release a single contract

on works contract basis. This contention is also without any merit because in the MOD held on 11/1/1991 (before issuance of TOI dated 11/1/1991), it is clearly recorded that the appellant is amenable to placement of two orders for supply and erection part. Thus the only grievance made by the appellant that the acceptance is contrary to the offer made by the appellant is also unsustainable.

35. Once it is held that the TOI dated 11/1/1991 constituted a binding contract between the parties, it is not necessary to go into material differences in the purchase orders pointed out by the appellant. As stated earlier, from the correspondence exchanged between the parties, it is seen that both the parties treated the broad terms contained in the TOI dated 11/1/1991 to be followed by purchase orders are binding on parties and the execution of the project work was undertaken on the footing that there is a binding contract. Accordingly, we hold that the learned arbitrator as well as the learned Single Judge were justified in holding that there was a concluded contract and the objection of the appellant in referring the disputes to the arbitration on the ground that there was no concluded contract was wholly unjustified.

36. As regards the quantum of damages is concerned, the scope of judicial enquiry is very limited. The contention of the appellant is that the damages have been awarded in favour of the respondent without determining the date on which the breach was committed and without their being any evidence adduced by the respondent as to the market price prevailing on the date of breach. There is no merit in this contention. Although the appellant by a letter dated 9/11/1991 had requested the respondent to bear the additional cost due to escalation in the prices of the items, it was by a letter dated 30/4/1992 the appellant had stated that unless the additional cost of Rs.110 lakhs is borne by the respondent, the appellant will not be in a position to complete the project. In these circumstances, taking the quantum of market price contained in the letter of the appellant dated 30/4/1992 as the basis and quantifying damages on the footing that the breach was committed in April, 1992 cannot be faulted. The fact that the contract was terminated on 16/11/1992 and the fact that no independent evidence regarding the market price prevailing in April, 1992 has been adduced by the respondent makes no difference. As held by the Apex Court in the case of M.N.Gangappa (supra) damages

can be quantified and awarded to the respondent on the basis of the market price determined by the appellant.

37. Although it was contended that the arbitration clause was objected to orally, once it is found from the correspondence that both the parties had unconditionally treated the terms contained in the TOI dated 11/1/1991 followed by purchase orders as binding contract, it would not be open to either of the party to get rid of the contract already made. The finding given by the learned arbitrator that the respondent was also responsible for the delay in executing the project work, does not absolve the appellant from its obligation to pay damages on account of its failure to complete the project work as per the terms of contract. From the minutes of the meeting dated 30/9/1991 and the letter addressed by the appellant to the respondent on 3/10/1991 it is seen that as late as in October, 1991, the appellant was desirous of completing the project within the time stipulated under the contract. It is only after EIL backed out of the project, the appellant found it difficult to complete the project. Thereafter, the appellant agreed to complete the project only if the additional cost is paid. In these circumstances, the fact that the appellant had decided to award the said

project to a third party in October, 1992 has no relevance and does not absolve the appellant of its liability to pay damages.

38. For all the aforesaid reasons, we see no merit in the appeal and the same is dismissed. However, there will be no order as to costs.

(R.M. LODHA, J.)

(J.P.DEVADHAR, J.)